SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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vs.

FREDERICK S. KEPNER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Baltimore and Ohio Railroad Company, a corporation organized and existing under the laws of the State of Maryland, respectfully shows to this Honorable Court:

A Summary Statement of the Matter Involved.

Your petitioner sought in the State courts of Ohio to enjoin the respondent from the prosecution of his action in the District Court of the United States for the Eastern District of New York under the Federal Employers' Liability Act, on equitable grounds sufficient under the law of

Ohio to justify such an injunction against the prosecution of such action in other than a Federal Court. To its petition respondent demurred and claimed that the provisions of Section 6 of the Federal Employers' Liability Act as amended Title 45 U. S. C., Sec. 56 (36 Stat. 291) prevented the courts of Ohio from exercising such equitable jurisdiction, and restraining the prosecution of said action, which contention was sustained by the Supreme Court of Ohio, being the highest court of that State. This contention of the respondent was made in the court of first instance, the Common Pleas Court of Hamilton County, Ohio, and was the basis of the decision of that court denying an injunction, a copy of the opinion of said court being annexed hereto as Appendix A. It was also the sole basis for the decision affirming such action of the Supreme Court of Ohio, as shown by its opinion (R. 34). *Baltimore & Ohio Rd. Co., Appellant* v. *Kepner, Appellee*, 137 Ohio St. 409, Advance Sheets in 13 Ohio Bar, December 23, 1940,—N. E. 2nd—. Therein the court said at page 411 of the report (R. 36):

> "The defendant's demurrer admits all well-pleaded facts including allegations to the effect that defendant's prosecution of his action against the railroad company in the District Court of New York more than 700 miles from his residence, and the place of his accident, will inconvenience and harass the railroad company, and will subject it to unnecessary expense. We may therefore assume that the equities shown by the petition favor the contention of the plaintiff, and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action. Defendant Kepner predicates his demurrer to the petition on the provisions of Title 45, Section 56, U. S. Code. * * *"

The syllabus by the court (R. 34) is as follows:

> "The state courts of this state cannot, in the exercise of their equity powers, enjoin a resident of the state from prosecuting a cause of action, arising under

> the Federal Employers' Liability Act, in a federal court of another state having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this state, and even though its prosecution in the federal court of another state may cause great inconvenience and expense to the defendant."

The facts alleged in the petition for injunction (R. 1-6) admitted by the demurrer, and assumed by the Ohio Supreme Court to support your petitioner's contention, and substantiated by affidavits (R. 23-31), are these:

Respondent is and for many years has been a resident of Hamilton County, Ohio (R. 2, 27). He was employed by your petitioner and was injured on May 18, 1939, while so employed at East Middletown, Butler County, Ohio, immediately adjoining Hamilton County to the north (R. 1, 2, 27). Petitioner operates lines of railroad in both counties and has numerous agents in each upon whom service can be made (R. 2, 27).

No suit has been filed by the respondent for his injuries in Hamilton or Butler Counties or in the United States District Court for the Southern District of Ohio, all of which courts are in constant session (R. 2, 3).

Respondent employed Morris S. Borden and Samuel T. Gaines, attorneys of Cleveland, Ohio, to represent him, each of whom are engaged in general practice of law in Cleveland, and respondent failed to avail himself of the courts immediately available and within a reasonable distance of the residence of any and all of the witnesses necessary for the trial, but by agreement and conspiracy among respondent and his counsel proceeded to file suit in the United States District Court for the Eastern District of New York (R. 2, 3).

To maintain its defense, petitioner will have to transport not less than twenty-five witnesses (R. 3, 25), all of whom

reside in Hamilton or Butler Counties, Ohio (R. 1), a distance of over seven hundred miles (R. 3). These witnesses consist of the employees of petitioner, numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention and numerous other non-employee witnesses as to various essential elements (R. 3, 4).

The medical witnesses are highly important because the nature and extent of respondent's injuries are seriously disputed. All of the others are important because liability is disputed (R. 28).

Petitioner would be totally deprived of its legal right of process to force the attendance of witnesses in the United States District Court, Eastern District of New York (R. 5), and they could not be compelled to attend a trial in New York and such as would consent to do so would have to be transported and maintained during the trial at great expense, which would be exceedingly heavy as to the medical experts. This expense would exceed by $4,000 the cost of the trial of the same issues in a court located near the residence of respondent (R. 4). The employee witnesses are engaged in interstate train service.

It is impossible to anticipate all of the witnesses that might be necessary and get them to the trial if needed (R. 5, 25, 29). The presentation of testimony by depositions cannot effectively present to the court and jury the facts involved, petitioner being deprived of the right of presenting the witnesses in person, and rebuttal evidence would be impossible of procurement and submission (R. 5, 25, 29).

Trials in the United States District Court, Eastern District of New York, are assigned in numerical order and it is impossible to tell the exact day the case will start (R. 4, 24). Therefore, it would be necessary to have the witnesses in New York a number of days prior to the probable date of trial because of the long distance involved (R. 4,

24). When the case is called for trial both parties must be ready to proceed forthwith.

Respondent conspired with his attorneys of Cleveland, Ohio, to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that respondent had against the petitioner (R. 6), and the continued prosecution of the action in New York would constitute an undue burden on interstate commerce and would be an unreasonable, improper and inequitable burden upon the petition, and such unreasonable and inequitable proceeding would result in no benefit to the respondent (R. 5, 6).

All of the foregoing facts were admitted by the respondent to be true.

The Court of Common Pleas of Hamilton County, Ohio, entered a temporary restraining order, enjoining and restraining the respondent from proceeding with said cause of action in the United States District Court for the Eastern District of New York (R. 14). Thereafter, on May 14, 1940, said court sustained a demurrer to the petition on the ground that the injunction prayed for would be in contravention of a right granted by the Federal Employers' Liability Act as amended, Title 45, U. S. C., Sec. 56 (36 Stat. 291) (R. 16). On May 15, 1940, an appeal was perfected in the Court of Appeals for the First Appellate District of Ohio, and on May 16 your petitioner presented to said Court of Appeals a motion for a temporary restraining order, at which time said court determined to pass on the appeal, and, it appearing on argument that a judgment sustaining said Common Pleas Court would be in conflict with the Court of Appeals of the Second Appellate District of Ohio (Appendix B, hereto attached, p. 14), said Court of Appeals of the First District did, from the bench, dismiss the petition and deny an injunction (R. 19), and

pursuant to Article IV, Section 6 of the Constitution of the State of Ohio, did thereupon certify said cause to the Supreme Court of Ohio, which court granted a restraining order on May 24, 1940 (R. 45). Thereafter said cause was heard on the merits by said Supreme Court of Ohio, and on July 10, 1940, said court by a three-to-three decision affirmed said Court of Appeals (*The Baltimore and Ohio R. R. Co., Appellant, v. Frederick S. Kepner, Appellee*, 137 Ohio State 206, 28 N. E. (2) 586) (R. 46). Thereafter, the court on October 2, 1940, granted a rehearing (R. 46), and after reargument said court again affirmed the judgment below in an opinion rendered December 18, 1940, 137 O. S. 409, Advance Sheet Ohio Bar, December 23, 1940, No. 40, and on December 20th restrained the respondent, the defendant-appellee in that court, from prosecuting his case in the District Court of the United States for the Eastern District of New York until this petition for certiorari might be determined by this Court (R. 48-49). Application for rehearing was thereafter filed and on December 31, 1940, denied by the Supreme Court of Ohio (R. 46, 49).

The Supreme Court of Ohio assumed that the equities alleged and admitted by demurrer were sufficiently great to warrant the granting of an injunction except that the Federal Employers' Liability Act barred the Ohio State courts from issuing an injunction against its citizens from proceeding in any Federal District Court, in which district the defendant shall be doing business.

It was the contention of your Petitioner that Congress did not expressly prohibit a court of a state from exercising its equitable jurisdiction over its citizens, that Congress merely gave the employee the right to sue concurrently in a state or federal court where the employer was doing business, that Congress could be presumed to have known that a court of equity had jurisdiction to prevent citizens of its jurisdiction from unjustly harassing and oppressing others

by bringing suits at a point farthest away from the residence of the employee and the situs of the accident and that as Congress did not expressly prohibit such equitable action a State court could restrain citizens of that state from such harassment in accordance with the well-founded principles of equitable jurisprudence.

The Supreme Court of Ohio by its said opinion rejected these contentions holding that Section 6 of the Federal Employers' Liability Act gave the injured employee the privilege of bringing his action in the District Court in any district, however remote, in which the defendant was doing business, when sued, and that the courts were without power to prevent his arbitrary and unreasonable choice of the farthest district, no matter how inequitable such choice might be.

Jurisdiction of This Court.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. C., Title 28, paragraph (b), Section 344, authorizing petitions for writs of certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is set up or claimed under a statute of the United States. In this case a privilege or immunity was set up and, as we contend, erroneously sustained. The Common Pleas Court construed Section 6 of the Federal Employers' Liability Act as amended April 5, 1910, Title 45 U. S. C., Sec. 56 (36 Stat. 291), so as to prevent courts of Ohio from restraining the Respondent from maintaining vexatious and harassing litigation (Appendix A p. 11). Demurrer Sustained (R. 16). The Court of Appeals of Ohio, without opinion, likewise dismissed the petition (R. 19). And the Supreme Court of Ohio affirmed, and, on rehearing affirmed and so construed said Section 6 of the Federal Employers' Liability Act as to

prevent the courts of Ohio from restraining its citizen from maintaining vexatious and harassing litigation in a distant federal court under the Federal Employers' Liability Act.

The Supreme Court of the State of Ohio is the highest court of that State. Its decision (R. 34) in this matter is final. An application for rehearing was denied. (R. 49) The writ, if granted, would be directed to the Supreme Court. This petition is filed within twenty days of the date of the entry granting the temporary stay and injunction of December 20, 1940 (R. 46, 48). The bond required was filed within the aforesaid time limitation (R. 46).

Specification of Errors.

Your petitioner submits that the Supreme Court of the State of Ohio was in error in the following respects:

1. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals and of the Court of Common Pleas, and in not reversing the Court of Appeals and the Court of Common Pleas.

2. The Supreme Court of Ohio erred in failing to enjoin permanently the Respondent from prosecuting his suit pending in the United States District Court for the Eastern District of New York.

3. The Supreme Court of Ohio erred in its interpretation of the Federal Employers' Liability Act.

4. The Supreme Court of Ohio erred in construing the Federal Employers' Liability Act as preventing the courts of Ohio from enjoining a citizen of that state within the courts' jurisdiction from prosecuting an action under that Act in a Federal court so distant, and under such circumstances, as under the law of Ohio constituted vexatious, harassing, inequitable conduct subject to injunction.

5. The Supreme Court of Ohio erred in holding that the question involved was one of denying or interfering with the jurisdiction of the Federal courts.

6. The Supreme Court of Ohio erred in not applying the law of Ohio in determining what conduct of its own citizen was inequitable and subject to the injunctive power of the courts of that State.

Reasons for Granting the Writ.

It is submitted that the Court should entertain jurisdiction for the following reasons:

(a) The question is of importance as evidenced by the numerous reported decisions in the Federal and State courts, bearing more or less upon the questions involved, and referred to in the accompanying brief.

(b) The reported cases are in conflict.

(c) The question is one of substance which this Court should determine in the interest of uniformity and to avoid further litigation.

(d) The Supreme Court of Ohio misconstrued applicable decisions of the Federal Courts.

(e) The Supreme Court of Ohio misconstrued the Federal Employers' Liability Act.

In view of the importance of the question involved to the railroad companies of this country owing to the vast mileage covered by them and the unfair, unreasonable and unjust advantage inuring to the employee if permitted to seek out the point farthest away from his residence and situs of the accident to file his action, and in view of the conflict of the opinions of various courts on the question, concern-

ing which this Court has not made a decision, we submit this question should be decided by this Court and we contend further that it should be so decided that, in accordance with the principles of equity, a state court may be permitted on fair trial to determine whether or not the action of its citizen would result inequitably to the railroad company.

Your Petitioner presents herewith as a part of this petition a certified copy of the transcript of the record of the Supreme Court of Ohio and presents its brief for consideration with this petition discussing at greater length the questions involved.

Wherefore, your Petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of Ohio commanding said court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of proceedings in said court entitled, "The Baltimore and Ohio Railroad Company, Plaintiff-Appellant, *v.* Frederick S. Kepner, Defendant-Appellee", and numbered 28205 in said court to the end that said case may be reviewed and determined by this Court and that the Petitioner may have such relief as this Court may deem proper, including a restraining order against Respondent enjoining him temporarily until final hearing by this Court from proceeding with his action now pending in the District Court of the United States for the Eastern District of New York, and that the opinion and judgment of the Supreme Court of Ohio may be reversed by this Honorable Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

APPENDIX A.

COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO.

No. A-69867.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, *Plaintiff*,

vs.

FREDERICK S. KEPNER, *Defendant*.

Memorandum Opinion.

Heard on demurrer to petition, and
On motion to dissolve temporary restraining order.

RYAN, *J.*

The plaintiff, The Baltimore & Ohio Railroad Company, brings this action to restrain the defendant, Frederick S. Kepner, from prosecuting in the United States District Court of the Eastern District of New York an action arising under the Federal Employers' Liability Act. It is admitted that the plaintiff company was doing business in that district at the time the action was commenced.

The plaintiff herein alleges in its petition that it is a corporation organized under the laws of Maryland, with its principal office at Baltimore; that on May 18, 1939, the defendant Kepner sustained personal injuries at East Middletown, Butler County, Ohio, while engaged in the performance of his duties as a brakeman; that he now, and was at the time said injuries were sustained, a resident of Elmwood Place, Hamilton County, Ohio.

It is further alleged that the action brought by the defendant, more than seven hundred miles distant from his residence, will cause great inconvenience and unwarranted expense to the plaintiff herein in the matter of transportation and keep of witnesses; that it will be deprived of its right to compel the attendance of witnesses, and that it will

be required to depend on depositions for the trial of said cause; that it will be deprived of its right to present necessary rebuttal evidence, and that the prosecution of said action in the United States District Court of the Eastern District of New York will constitute an undue burden on interstate commerce and will be an unreasonable, improper and inequitable burden on the plaintiff herein with no benefit to the defendant Kepner.

The defendant demurs to the petition for the reasons that:

First. Petition does not state facts which show a cause of action, and

Second. That the court has no jurisdiction of the subject of the action.

The defendant Kepner predicates his demurrer on the provision of *Title* 45, *U. S. Code*, *Section* 56, which provides as follows:

> "Under this chapter an action may be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

On consideration of the arguments of counsel, and an examination of the numerous authorities cited, the Court finds the weight of authority to be in accord with the decision in the case of *C. & O. Ry. Co.* v. *Vigor*, 90 Fed. (2d) 7, the pertinent syllabi of which are as follow :

> "2. Railway company held not entitled to injunction against administratrix' prosecution of action against it for employee's death, in Federal Court of the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.
>
> 3. Railway Company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses

resided and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.

4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages under Federal Employers' Liability Act in any district wherein defendant is doing business,"

and wherein the Court said at page 8:

"The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held in Southern Railway Company *v.* Cochran, 56 F. (2d) 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority, and it is controlling in the case at bar."

As to the case of *N. Y. C. & St. L. Rd. Co.* vs. *Matzinger*, 136 O. S., 271 (Ohio Bar, February 12, 1940), cited by defendant, this Court is of the opinion that it is readily distinguishable from the instant case for there the question of an express statutory right granted by Congress was not involved. In its opinion the Court states that the decree "is not in contravention of any right given by the Constitution or laws of the United States."

Considering the case of *B. & O. R. R. Co.* vs. *Inlow, No.* 3111, Franklin Court of Appeals, wherein the Court on rehearing reversed its former decision in order to follow the ruling made in the *Matzinger* case, it appears that there, as in the instant case, the question of an express statutory

right granted by Congress was involved and the decree which granted the restraining order was in contravention of the right granted by *Title* 45, *U. S. Code, Section* 56.

In view of the above the Court concludes that it is not obliged to regard either of the above Ohio decisions as authority determinative of the questions here presented.

Wherefore, the Court finds the demurrer to the petition herein to be well taken and does therefore sustain the same.

In addition to the demurrer the defendant has filed a motion to dissolve the temporary restraining order heretofore issued. In view of the ruling on the demurrer, the Court now finds said motion to be well taken and does therefore grant the same.

Entries will be made in accordance herewith.

* * * * * * *

May 10, 1940.

APPENDIX B.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

THE BALTIMORE & OHIO RAILROAD COMPANY, *Plaintiff-Appellant*,

v.

ORRIS E. INLOW, *Defendant-Appellee*.

Decision.

Rendered on the 20th day of March, 1940.

HORNBECK, *P. J.*

Submitted on applicaton of appellant for rehearing upon the authority of *New York Central and St. Louis R. R. Company* v. *Matzinger*, 136 O. S. 271. This decision was reported after we had handed down our opinion in this case, and we therefore did not have the benefit of it when we considered the case in the first instance on its merits.

We have not only examined the decision of the Supreme Court, but we have secured and carefully considered all the facts appearing in the case as found in the briefs of the parties filed in the Supreme Court. We are required to say that in all essential facts the *Matzinger* case is like unto the instant case, and therefore the opinion of the Supreme Court is controlling upon us and requires us to now change our position and to hold that the demurrer to the petition should have been overruled, and the defendant required to plead.

No other course is open to this Court in view of the liberal construction which must be accorded the petition under our Code provision, Section 11345, G. C. The judgment of the trial court in this case being predicated upon the sustaining of the demurrer to the petition, there is no ground for differentiation of fact or exercise of discretion as to the issuance of the injunction, as prayed. These prerogatives will arise only after issues are properly drawn.

Rehearing granted. Judgment reversed. Cause remanded.

HORNBECK, *P. J.*, and BARNES, *J.*, concur.
GEIGER, *J.*, dissents.

APPEARANCES:

JAMES I. BOULGER,
Attorney for Plaintiff-Appellant.

LEO G. HANNA, Chicago, Ill., and
PAUL T. KEY,
Attorneys for Defendant-Appellee.

GEIGER, *J.*, dissents:

On the 7th day of February, 1940, this Court rendered a decision in the above entitled case affirming the Court below and holding in substance that inasmuch as Congress has granted the workman a choice of the forum, the state court has no power to enjoin the workman from exercising this right for any but the most substantial reasons.

The Supreme Court on the same day rendered an opinion in the case of *New York, Chicago & St. Louis R. R. Co.*,

Appellee v. *Matzinger, Appellant*, 136 O. S. 271. This opinion was not available to this Court until after its opinion had been rendered.

Thereupon counsel for the plaintiff-appellant filed an application for rehearing based upon the holding of the Supreme Court above referred to.

The facts in the two cases are quite similar but not identical.

The question, however, remains as to whether the Supreme Court decision requires this Court to reverse its judgment. This Court gave the reasons why it considered the Court without power to restrain the plaintiff and sustained the Court below in its decision to the same effect. In the case before the Supreme Court the trial court took the same position as was taken by the trial court in this case, but that judgment was reversed by the Court of Appeals, and the Supreme Court sustained the Court of Appeals.

The most that can be claimed for the Supreme Court decision is that this Court would have been sustained in reversing the Court below and granting the injunction. The decision, however does not require this Court to reverse itself if it is of the opinion that the facts stated in the petition did not justify the issuance of a restraining order. I am still of the opinion that under the facts in the case at bar the Court below was not in error in overruling the application for an injunction and that this Court was not in error in sustaining the Court below. I refer to our original opinion.

APPENDIX C.

Statute Involved.

45 U. S. C., Sec. 56. Actions; limitations; concurrent jurisdiction of courts; removal of case in State court. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States (Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER.

BRIEF IN SUPPORT OF THE PETITION.

This brief, in support of the Petition for a Writ of Certiorari, seeks to reverse the judgment of the Supreme Court of Ohio denying the petitioner's application for an injunction to restrain the respondent from prosecuting a suit under the Federal Employers' Liability Act, in a Federal District Court in the Eastern District of New York. The court sustained the contention of the respondent and based its denial solely because Section 6 of that Act prevented it from granting an injunction that otherwise would have been granted.

The opinion below is *The Baltimore & Ohio Railroad Company, Appellant,* v. *Kepner, Appellee,* 137 Ohio St. 409, decided December 18, 1940, on Rehearing, published in advance sheets, 13 Ohio Bar for December 23, 1940 (R. 34).

Statement of the Case.

In the interest of brevity the court is respectfully referred to the Petition for a Writ of Certiorari herein in which is recited a statement of the facts, as well as a statement of the history of the case, and also to the opinion of the Ohio Supreme Court.

The statute involved is Section 6 of the Act as amended in 1910 (45 U. S. C. § 56): See Appendix "C" Petition for Certiorari, p. 16.

Summary of Argument.

I.

Equity has inherent power to restrain the prosecution of vexatious and harassing litigation.

Pomeroy on Equity Jurisdiction, 3rd Ed. Vol. 4, Sec. 1360, and Vol. 6, Sec. 670;

Cole v. *Cunningham*, 133 U. S. 107;

Snook v. *Snetzer*, 25 O. S. 516;

N. Y. C. & St. L. Rd. Co. v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349.

II.

The Federal Act did not enlarge nor take anything from the jurisdiction of the State courts.

Douglas v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, and cases in the argument, bottom of page 383.

III.

The Federal Act contains no express prohibition against the States exercising their inherent powers of equity. Such a prohibition is not to be inferred from the Act.

Maurer, et al. v. *Hamilton, et al.*, 309 U. S. 598, 614;

Reid v. *Colorado*, 187 U. S. 137, 148.

IV.

The Federal Act was not a regulation complete in itself, but left the State courts free to act in various ways.

Seaboard Air Line Ry. v. *Kenney*, 240 U. S. 489.

V.

The restraint of a party to a suit is not tantamount to the restrain of the court itself.

Steelman v. *All Continent Corporation*, 301 U. S. 278, 290, 291.

VI.

The facts in the present case are sufficient to invoke the equitable powers of a court.

B. & O. Rd. Co. v. *Kepner*, 137 Ohio St. 409 (R. 34).

VII.

The weight of authority supports the right to injunction and the Supreme Court of Ohio erred in holding otherwise.

VIII.

The Supreme Court of Ohio misconstrued the Federal Act, applicable decisions, and cited, in support of its conclusions, cases not applicable.

IX.

Whether the conduct of an Ohio citizen is equitable is a question of law, which an Ohio court having jurisdiction of the citizen is to determine in accordance with that law unless Congress within its delegated powers has made an enactment inconsistent with the Ohio law.

Statement of the Questions Involved.

The rule of the Supreme Court of Ohio is that the syllabus which is by the court states the law of the case, 136 O. S.

Rules of Practice, Page LXXII, Rule VI. It is to be read in the light of the facts as stated in the opinion. Rule VI. See also *The B. & O. Rd. Co.* v. *Baillie*, 112 O. S. 567, Syl. 2. The syllabus of the opinion below reads:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

Your petitioner contended below that there is nothing in the Federal Act to prevent a State court from enjoining a citizen of that State from prosecuting an action under the Federal Act, whether in a State or Federal Court, where that prosecution would, under the circumstances, be inequitable, harassing, vexatious and contrary to the best interests of justice. And that the venue provisions of Section 6 of the statutes did not permit the employee to exercise his right of choice between the various jurisdictions available to him in an inequitable manner.

The respondent contended that under the Federal Act he could not be restrained from such prosecution in any Federal District Court in whose district the railroad did business, even though such prosecution would be in violation of the equitable principle just referred to.

It is submitted that the Ohio Courts erred in sustaining respondent's contention.

ARGUMENT.

Courts of Equity Have Inherent Power to Enjoin the Prosecution of Suits Under Harassing, Vexatious, and Inequitable Circumstances.

This power, we submit, is inherent in all Courts, State as well as Federal. The author in *Pomeroy's Equity Jurisprudence* (3rd Ed. Vol. 4, Sec. 1360) says:

> "The use of injunctions to stay actions at law was coeval with the establishment of chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction."

In *Snook* v. *Snetzer*, 25 Ohio St. 516, the Court enjoined a citizen from prosecuting an attachment in West Virginia against another Ohio citizen whose earnings were exempt in Ohio but not in West Virginia.

In *N. Y. C. & St. L. R. R. Co.* v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349, the syllabus, by the court, reads:

> "A Court of equity may restrain a person over whom it has jurisdiction from bringing or maintaining in a foreign State an action for the purpose or with the effect of unduly harassing or oppressing the defendant, or securing to the plaintiff some unfair, unconscionable or inequitable advantage."

Ohio cases are collected in 11 Ohio Jur., Courts, Sec. 80, 16 Ohio Jur., Equity, Sec. 102, 21 Ohio Jur., Injunction, Sec. 141.

Snook v. *Snetzer*, *supra*, was followed with approval by this Court in *Cole* v. *Cunningham*, 133 U. S. 107, a case cited throughout the decisions bearing upon the equitable principle involved. In *Cole* v. *Cunningham*, this Court followed

Dehon v. *Foster*, 4 Allen 545, (Mass.), and at the middle of page 124 said:

> "Dehon *v.* Foster, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, C. J., points out that the jurisdiction of a Court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the Courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in Courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the Court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

Cole v. *Cunningham* was last cited by this Court in 1936, in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 291.

The Federal Employers' Liability Act Does Not Foreclose the Exercise of the Equity Powers of the State Courts.

There is nothing in the Act expressly prohibiting the exercise by the State Courts of their equity powers in a matter of this kind. On the contrary, we find that various powers of the State Courts have been upheld as against the Federal Act.

In *Douglas* v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377, the question was as to the right of a Connecticut citizen, where the accident happened in Connecticut, suing under the Federal Act in a New York State Court, a Connecticut corporation, doing business in New York. This Court invoked a New York statute that authorized the State Courts to dismiss the action. The last paragraph of the opinion, page 387, reads:

"As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57."

A State Court may order a conditional remittitur of damages. *Roy* v. *Oregon S. L. R. Co.*, 55 Idaho 404, 42 Pac. (2d) 476, c. d. 296 U. S. 579.

States retain full control over administrators and executors appointed by its Courts. *Spoo* v. *C. R. I. & P. Ry. Co.*, 191 Iowa 1134, 183 N. W. 850.

State procedure is sustained even though perjury of witnesses is proved. *Taylor* v. *C. C. C. & St. L. Rd. Co.*, — Mo. —, 63 S. W. (2d) 69, c. d., 290 U. S. 695.

The states may say whether the jury shall be unanimous or whether nine or less may return a verdict. *M. & St. L. R. R. Co.* v. *Bombolis*, 241 U. S. 211.

The states may decide who are the next of kin. *S. A. L. Ry.* v. *Kenney*, 240 U. S. 489.

The states may decide who is a beneficiary. *M. & S. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66.

The states may determine the rate of interest on judgments. *N. Y., N. H. & H. R. R. Co.* v. *Marmann*, 253 N. Y. S. 450, c. d. 288 U. S. 601.

The states may decide what constitutes service of summons. *Klinge* v. *So. Pac. Co.*, 65 F. (2d) 85, c. d. 290 U. S. 657.

The states may decide these cases under the state rules of pleading. *Williams* v. *St. L. & S. F. RR. Co.*, 85 S. W. (2d) 624, — Mo. —.

An award under a state compensation law is a bar to a judgment in a suit under the Act. *C. R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611.

The state may prohibit a suit under the Act jointly against a railroad and a fellow employee. *Lee* v. *Cent. of Ga. Ry. Co.*, 252 U. S. 109.

A state venue statute was sustained in an action under the Federal Act. *Loftus* v. *Penn. R. Co.*, 107 Ohio St. 352; *Doll* v. *C. Y. W. Ry. Co.*, 159 Minn. 323, 198 N. W. 1006.

A state statute for a lien for an attorney's fee held good in an action under the Act. *Dickinson* v. *Stiles*, 246 U. S. 631.

A state statute providing a penalty for a frivolous appeal was sustained. *L. & N. R. Co.* v. *Stewart*, 241 U. S. 261.

Employees always had a right to sue a railroad for negligence. When Congress passed the Statute it knew that the courts had inherent power to enjoin citizens from maintaining harassing litigation. In *Maurer, et al.* v. *Hamilton, et al.*, 309 U. S. 598, this court, top of page 614, said:

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

The same principle was expressed by Mr. Justice Harlan in *Reid* v. *Colorado*, 187 U. S. 137, 148:

> "* * * It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should

> be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243."

We contend that there is nothing in the Act to show that Congress intended to nullify the equity powers of the State courts in cases arising under the Act.

Congress, as much as the courts, must have realized that the broad venue provisions of the act might result in inequitable use of such provisions and have left the courts unfettered to prevent by injunction such inequitable action.

The injunction would not have deprived the respondent of any right specifically granted by the Act. It reads, "An action may be brought in a District Court of the United States in the district * * * in which the defendant shall be doing business at the time of commencing such action." Notwithstanding the injunction he still could sue in the district in which the defendant shall be doing business convenient for him and all parties. The statute does not say he can sue in any district in which the defendant shall be doing business, although the Supreme Court of Ohio and other courts have erroneously assumed that Congress intended "the district" to mean "any district".

This Court prohibits actions under the Act in state courts if the business in that jurisdiction of the defendant is only the maintenance of an office for solicitation where the prosecution thereof would burden interstate commerce and no reason is apparent for a distinction were the selected tribunal a federal district court. *Michigan Cent. R. R. Co.* v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

The Restraint of a Party to a Suit is Not Tantamount to the Restraint of the Court Itself.

It is not and never has been contended by the Petitioner that an injunction by the Supreme Court of Ohio would

in any way interfere with or impair the jurisdiction of the District Court of the United States for the Eastern District of New York. The action was only to enjoin the respondent, who is a citizen of Ohio and subject to the jurisdiction of the Common Pleas Court of Hamilton County, Ohio, on the ground that he was using a legal process in an inequitable, unconscionable and vexatious manner by proceeding with his action brought in that distant court. The language of Mr. Justice Cardozo in *Steelman, Trustee in Bankruptcy* v. *All Continent Corp.*, 301 U. S. 278, 290, is appropriate. He said, omitting citations:

> "The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. Suits as well as transfers may be the protective coverings of fraud. We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

Judge Learned Hand, for the Circuit Court of Appeals, Second Circuit, in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, at page 571, near the end of the second column said:

> "For the Virginia suit was based upon the notion that plaintiff was using inequitably a legal right—the right of action under the Federal Employers' Liability

Act—just as he might use the legal title to land inequitably."

We submit that Congress did not grant the employee a Federal right to do an inequitable thing and one which equity would enjoin but for the Act. The granting of an injunction by Ohio courts would not deny the respondent a Federal right because Congress has not given a right to bring an inequitable action. To express it differently, Congress has not attempted either expressly or by implication to deprive the State courts of their jurisdiction in equity. The State of Ohio is a sovereignty having inherent rights to control its citizens from maintaining unjustly harassing and vexatious litigation. That inherent right was not expressly denied in the Federal Act and unless expressly denied the statute must be strictly construed against a denial of such right by implication.

Facts Justifying Injunction.

This Court is familiar with the serious burden on interstate commerce from the prosecution of tort cases in remote jurisdictions. *Davis, Director General* v. *Farmers' Cooperative Co.*, 262 U. S. 312; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. It is held that such burden to interstate commerce bars the prosecution of such suits. In *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, the Court held that such burden on interstate commerce is not a bar to the prosecution of an action under the Federal Employers' Liability Act in a jurisdiction where the defendant railroad owns and operates railroad lines. There is presented in this case something more than mere burden on interstate commerce. It is alleged that the Ohio plaintiff, Kepner, and his Ohio counsel conspired to bring his action in the Eastern District of New York for the purpose of annoying, harassing and vexing petitioner herein, the railroad com-

pany, without a sound and proper purpose of reasonably prosecuting any right of action that Kepner may have against the railroad company. Brooklyn, New York, where the action is pending, is eight hundred miles from the scene of the accident and seven hundred seventy-five miles from the residence of Kepner. The railroad company has twenty-five witnesses, all in Hamilton and Butler Counties, Ohio, none of whom are subject to subpoena in the pending action. It has never been claimed that Kepner has any witnesses other than those in Ohio. It is impossible to ascertain in this District Court a definite time of trial and it would be necessary to be ready for trial and the railroad company have its numerous witnesses in New York several days before the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for the trial itself, and the actual cost would exceed that in a jurisdiction adjacent to the accident or residence of Kepner by at least $4000.00.

The inequity in this prosecution exceeds the inequity in the case of *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 O. S. 271, and that in *Denver & R. G. W. R. Co.* v. *Terte*, *supra*. This Court will take judicial notice, as did the Ohio Supreme Court in the Matzinger case, of the fact that the presentation of evidence by deposition is unsatisfactory and also of the fact that it is obvious that rebuttal evidence would be impossible of procurement and submission. Where there is a large number of physicians and surgeons, as is the case herein, a more than usual amount of expense and annoyance is involved especially where such witnesses have to travel a long distance and be maintained a long and extended period of time awaiting opportunity to testify.

The Ohio courts below were asked to regulate the conduct of an Ohio citizen in accordance with the law of the State as declared by its Supreme Court governing his action with respect to the prosecution of actions of this character.

What constitutes proper conduct of a citizen of Ohio is determinable by the laws of Ohio. The Supreme Court of Ohio below (R. 36) said:

> "We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action."

This Court has pointed out in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, that the law of a State is that contained in the decisions of its courts as well as in its statutes and that the laws of the State are as binding on the Federal courts as on the State courts.

When one considers the tremendous amount of litigation that goes on under the Federal Employers' Liability Act and the possibility of the tremendous increase in the cost both of time and money in such litigation if it be the law that the plaintiffs therein may resort to the District Court of the United States having jurisdiction farthest removed from the plaintiff's residence and the scene of the accident, it must be concluded that there be in the courts an adequate remedy to prevent such abuse of the mere right of venue.

If, as the Court said in the Davis case, *supra*, 262 U. S., suits against carriers, especially at far distant points, is an undue burden on interstate carriers, then it is all the more a burden and an harassment to have railroad employees at the present time carried far distances, as here, and kept from their work for a long and indefinite period attending the trial, when they should be at work assisting transportation due to the emergency confronting the country today, as is evidenced by the numerous recent enactments of Congress, of which, we submit, the Court must take judicial notice.

Authorities Sustaining Right to Injunction.

Injunctions against the prosecution of inequitable and harassing actions under the Federal Employers' Liability

Act in distant State courts have been often sustained by the decisions of the highest courts of the State.

Reed's Admrx. v. *Illinois Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794.

At page 464, Judge Carroll for that court said:

> "We do not, however, give to this statute the peremptory effect claimed for it by counsel for the administratrix or agree with their contention that, as it was allowable under the act to bring this suit in the State of Minnesota, therefore the plaintiff could not be restrained by injunctive process from prosecuting it to a conclusion in that state. * * *
>
> "The Federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

Louisville & Nashville R. Co. v. *Ragan*, 172 Tenn. 593, 113 S. W. 743.

Kern v. *C. C. C. & St. L. Ry. Co.*, 204 Indiana 595, 185 N. E. 446.

State of Missouri ex rel., N. Y. C. & St. L. R. R. Co. v. *Nortoni*, 331 *Missouri* 764, 55 S. W. (2d) 272.

See also:

Chicago, M. & St. P. R. R. Co. v. *McGinley*, 175 Wis. 565, 185 N. W. 218.

It was there said at the bottom of page 220:

> "There is nothing in the Federal Employers' Liability Act as amended, which is indicative of an intent on the part of Congress to prohibit a court of equity from so regulating the conduct of its own citizens by an injunction, as to prevent hardship, oppression, or

fraud, and if prior to the passage of such Employers' Liability Act, the power existed in a court to grant relief by injunction as indicated, such power continued to exist and now exists."

New York, C. & St. L. R. R. Co. v. *Perdine*, 97 Indiana App. 517, 187 N. E. 349.
Alspaugh v. *N. Y. C. & St. L. R. Co.*, 98 Indiana App. 280, 188 N. E. 869.

This action of the State courts has been recognized as valid in the United States Circuit Court of Appeals in the Seventh and Second Circuits.

Ex Parte Crandall, 53 F. (2d) 969 (CCA-7), c. d. 285 U. S. 540.

We quote from page 971, second column:

"The general right of Indiana citizens to begin actions of this nature, wherever service of process on the defendant could be had, *was always potentially qualified by the jurisdiction of equity to restrain the citizen from commencing the action in a foreign jurisdiction, where to do so would unreasonably, inequitably, and unfairly harass, oppress or defraud the defendant.*

"*The Federal Employers' Liability Act does not assume to remove this qualification*, and in our judgment does not exempt the citizen from invocation against him of this equitable jurisdiction under facts which would in general justify its application." (Italics ours).

Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, (C. C. A.-2). At page 571, first column, it is said:

"* * * *The situation here is quite different; for even if the Virginia court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction.* * * * In the case at bar the questions ad-

judicated in Virginia were not those decided by motion in the Federal action. The Virginia decree was not granted because the action would burden interstate commerce, *but because it would unfairly vex and oppress the defendant, quite another ground.* * * *" (Italics ours).

Injunctions against the prosecution of such cases in distant Federal District Courts have been granted.

B. & O. R. R. Co. v. *Bole*, 31 Fed. Supp. 221.

Atlantic Coast Line R. R. Co. v. *Bryant* in Virginia, referred to in *Bryant* v. *A. C. L. R. R. Co.*, 92 F. (2d) 569, supra.

B. & O. R. R. Co. v. *Inlow* (Unreported) referred to by the Court below. Decision attached to petition for certiorari appended.

Authorities Denying or Claimed to Deny Right to Injunction.

The Supreme Court of Indiana has held that the terms of section 6 of the Federal Employers' Liability Act prevent a State court from enjoining a plaintiff in an action under that act from prosecuting a claim in any United States District Court in which the defendant does business. *McConnell* v. *Thomson*, 213 Indiana 16, 8 N. E. (2d) 986.

This decision was made notwithstanding the recognition in Indiana of the right to an injunction when the action under the Federal Employers' Liability Act is brought in a distant State court.

Kern v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 204 *Indiana* 595, 185, N. E. 446.

The Supreme Court of Ohio below at page 419 (R. 42) cites eight cases as supporting "by the overwhelming

weight of authority" the doctrine of *McConnell* v. *Thomson*, *supra*.

Of the cases cited, all but one related solely to the question of jurisdiction of the court in which was brought the action against the railroad under the Federal Employers' Liability Act. Of course, a court given jurisdiction by the Federal statute cannot refrain from exercising that jurisdiction when invoked pursuant to the statute. The four following cases were decisions on motions to dismiss for want of jurisdiction, or to set aside service, involving only the question whether or not the defendant railroad was doing business at the point served, or whether that jurisdiction could be denied by the court because of interference with interstate commerce. In none of them is there a consideration of the equitable principles asserted herein.

Connelly v. *Central R. R. Co., of New Jersey*, 238 Fed. 932;

Norris v. *Illinois Central R. R. Co.*, 18 F. (2d) 584;

Wood v. *Delaware & H. R. Corp.*, 63 F. (2d) 235 (C. C. A.-2);

Trapp v. *Baltimore & Ohio R. R. Co.*, 283 Fed. 655.

Southern Railway Co., v. *Cochran*, 56 F. (2d) 1019, was a decision of the Sixth Circuit Court of Appeals refusing a writ of prohibition against a District Judge to prevent his entertaining jurisdiction of an action under the Federal Employers' Liability Act. It did not seek an injunction against the plaintiff in a Federal Employers' Liability action, and involved solely a consideration of the jurisdiction of the District Court.

C. M. & St. P. R. Co. v. *Schendel*, 292 Fed. 326, s. c. 300 Fed. 273, was decided by the Eighth Circuit Court of Appeals on the basis that the Federal Court having acquired jurisdiction of an action under the Federal Em-

ployers' Liability Act had power to protect that jurisdiction to the extent of enjoining the railroad and others from interfering in the Iowa State courts with a proceeding in the Federal Court in Minnesota. The equitable phases were not involved. The court near the bottom of page 334 expressly says:

> "* * * We do not feel called upon to discuss the cases cited where the courts have held that equity may enjoin citizens of one state from bringing action in other jurisdictions. They do not apply to this situation. We are satisfied that the order was not issued on equitable grounds of oppression or hardship, but on the ground that the public policy of the state was being violated."

Hoffman, Judge, v. *Missouri, ex rel. Foraker*, 274 U. S. 21, considered the jurisdiction of a State court of a Federal Employers' Liability action in a Missouri county traversed by the railroad, when the accident occurred in Kansas and the deceased was a citizen of that state. The defendant was a Missouri corporation, and the question raised and decided in that case was that the incidental burdening of interstate commerce did not interfere with the jurisdiction of the State Court.

C. & O. Ry. Co. v. *Vigor*, 90 F. (2d) 7, (C. C. A.-6) was a case in which the Federal District Court for the Southern District of Ohio was asked to enjoin the prosecution of an action in the Federal District Court for the Northern District of Indiana on the ground of inequitable conduct on the part of the plaintiff in the Indiana suit, and unconscionable hardship imposed on the defendant in that suit by its prosecution at a distance from the scene of the accident, the residence of the plaintiff, and the residence of her decedent, all of which were in Ohio. A reason assigned by the court for its decision was that the facts alleged in the bill and set forth in the supporting affidavits did not justify the

court in reversing the court below. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The cases cited, therefore, do not sustain the point to which they are cited by the Supreme Court of Ohio, nor the principle of the decision of the Supreme Court of Indiana in *McConnell* v. *Thomson, supra.*

The court also cited 28 *American Jurisprudence* 400, Sec. 217, an authority which relies in part upon *McConnell* v. *Thomson, supra,* which, it is submitted, was wrongly decided. In Note 19 various cases of this court are cited to the general rule that State courts have no authority to enjoin proceedings in the Federal courts. None of these cases are at all like the case at bar. Four cases in 6 *Wallace* are cited, involving the same principle, the important opinion being *Riggs* v. *Johnson Co.,* 6 *Wallace* 166, 18 L. Ed. 768, in which the Supreme Court held that it was no defense to a mandamus proceeding in the Circuit Court of the United States against the County Commissioners requiring them to levy a tax to pay the judgment on county bonds awarded by that court; that the Commissioners had been enjoined in a State court from levying such tax, the suit for such injunction having been brought subsequent to the Circuit Court's judgment on the bonds. *Central National Bank* v. *Stevens,* 169 U. S. 432, 42 L. Ed. 807, is a case decided on the same general principle, in which a State court attempted to enjoin parties to a decree in the Circuit Court of the United States, determining their rights in their favor, from availing themselves of that decree, and com-

pelling them to re-litigate their rights in the State court. *Moran* v. *Sturgis*, 154 U. S. 256, 38 L. Ed. 981, 14 S. Ct. 1019, was a case reversing an injunction granted in a State court against parties claiming to hold marine liens, from prosecuting their proceeding in Admiralty under which the U. S. Marshal had seized vessels belonging to a corporation which the State court was winding up, which seizure by the Marshal was made on the same day that State receiver was appointed or before the State receiver had taken possession.

Two other cases cited—*Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 S. Ct. 119, and *Prout* v. *Starr*, 188 U. S. 537, 47 L. Ed. 584, 23 S. Ct. 398, were not cases involving injunctions by State courts, but, in the first was held invalid an injunction by the United States Circuit Court against the Commonwealth Attorney from prosecuting a criminal proceeding involving a decision of different questions from that to be determined in the United States Circuit Court, while in the second case, an injunction of the United States Circuit Court against Prout, Attorney General of Nebraska, was sustained, which order, among other things, enjoined him from proceeding with his action in a State court in which he sought a judgment contrary to a prior injunction in the United States Circuit Court against his predecessor and stipulations therein that that case would abide the judgment of *Smyth* v. *Ames*, 169 U. S. 466. No injunction was sought in the State court.

In the case at bar there is no attempt to have the State courts of Ohio draw to themselves or pass upon any of the issues of the case in the District Court of the United States for the Eastern District of New York, nor to compel the plaintiff therein to litigate his question in a State court. It would be entirely consonant with any injunction to be rendered, that the plaintiff employe bring his action in the District Court, the venue of which would be a reasonable

one for the determination of the issues. The issues in the State court were entirely distinct from the issues to be determined in the Federal Court.

There is also cited in 28 *American Jurisprudence* 400, *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 266, 43 S. Ct. 79, 24 A. L. R. 1077, holding that a State court and a Federal court may each litigate the same questions at the same time, without interference, one with another, where the actions are *in personam*. Such was the principle applied by the Circuit Court of Appeals for the Second Circuit in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, applying the principle to an action for damage under the Federal Employers' Liability Act pending in the United States District Court for the Eastern District of New York, and a suit for an injunction by the defendant therein against the plaintiff in the State court of Virginia, based on the inequity of the proceeding in New York.

It is therefore submitted, that there is no overwhelming weight of authority, as said by Judge Hart in his opinion at page 419 (R. 42), that the jurisdiction of the Federal Courts to determine causes arising under the Federal Employers' Liability Act cannot be interferred with by a State, or by a State or other courts.

Error of Indiana and Ohio Courts in Holding That Federal Employers' Liability Act Prevented Injunction of Prosecution in Federal Court.

The Indiana Supreme Court in *McConnell* v. *Thomson*, *supra*, and the Ohio Supreme Court, assumed that the plaintiff in an action under the Federal Employers' Liability Act is given a right by that act to sue the defendant railroad company in any United States District Court, in the district of which the defendant does business, and that such a right conferred by Federal statute cannot be interfered with by

the courts, whereas, the plaintiff's right to sue in any State court having jurisdiction of the subject matter of the litigation, and of the defendant railroad company, is not a right given by Federal statute, and if his action in a State court be inequitable its prosecution may be enjoined. The error in this position is that the plaintiff's right to sue in the court of another state than that of his residence, is a right conferred upon him by Section 2, Article IV of the United States Constitution, as construed by this court.

Blake v. *McClung*, 172 U. S. 239, 256;

Chambers v. *B. & O. R. R. Co.*, 207 142, 148;

Missouri Pacific R. Co. v. *Clarendon Co.*, 257 U. S. 533, 535.

A right conferred by the Constitution of the United States is certainly as important as a right conferred by statute. Equity can and should prevent an inequitable exercise of either right. The constitutional right to sue in a court of another state does not prevent a court at the domicil of that plaintiff from enjoining an inequitable invoking of that right.

Cole v. *Cunningham*, 133 U. S. 107, 109, 134; 14 R. C. L. 412, Sec. 113, *Injunctions*; 28 *American Jurisprudence* 392, Sec. 206.

That a Federal statute confers the right to sue in a Federal court does not prevent another court from enjoining plaintiff in a suit brought pursuant to such statute from further prosecution thereof, when such prosecution is inequitable or fraudulent.

Steelman v. *All Continent Co.*, 301 U. S. 278, 290.

The Supreme Court of Ohio Erred in Its Interpretation of the Bryant Case.

We call attention to the court's statement on page 421 of its published opinion (R. 43) where it said:

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the State Court of Virginia to enjoin the plaintiff from prosecuting his action in the Federal Court."

The Circuit Court of Appeals was not trying the injunction suit which the Railroad Company had brought in a State Court of Virginia; on the contrary, it was deciding against an injunction by the employe sought in the Federal Court in Brooklyn to restrain the Railroad Company from acting in the Virginia State Court. Near the bottom of the first column, page 571, the court, in the *Bryant* case, said:

> "The situation here is quite different, for even if the Virginia Court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction."

It seems to us, therefore, that the court's language in the *Bryant* case specifically was that the State Court of Virginia had jurisdiction to enjoin the employe from prosecuting his suit in New York. It concluded that the action for damages in the Federal Court in New York could proceed, as could also the action of the Railroad for an injunction in the Virginia Court. If, as the Supreme Court said, the court in the *Bryant* case did not approve the Virginia injunction, then what did the Circuit Court of Appeals mean by the quoted language? The Federal Court did not interfere with the prosecution of the Virginia injunction case, but said that it could progress, at the same time as the suit for damages in New York.

The Supreme Court of Ohio, we contend, appears to have fallen into an error, not unusual in these cases, of overlooking the fact that equity acts *in personam*, and that an action to enjoin is not an action against the foreign court, but against the State citizen who, it is claimed, is using a legal right in an equitable manner.

Closing Summary.

The power of courts of equity to enjoin citizens within their jurisdiction from prosecuting harassing and vexatious litigation in remote jurisdiction is well established and is not prevented by the constitutional provision guaranteeing the right to sue in the court of any State having jurisdiction of the subject matter of the litigation. The right granted by section 6 of the Federal Employers' Liability Act to bring an action in the district "in which the defendant shall be doing business" must have been granted in the light of that power of equity to restrain in a proper case the abuse of the right due to the very great extent of territory in which the railroads do business. An injunction to prevent prosecution of such action vexatiously many hundred miles distant from the residence of plaintiff, the place of the accident and the location of the witnesses, still leaves in the plaintiff the right to bring his action in a convenient district in which the defendant does business. The statute does not expressly provide that he may bring his action in every such district. This Court prohibits such actions in State courts if the business is only the maintenance of an office for solicitation, where the prosecution thereof would burden interstate commerce, and no reason is apparent for a distinction were the selected tribunal a Federal District Court. The Federal Employers' Liability Act nowhere expressly denies the right to the equitable relief sought by the petitioner and denied by the Ohio courts. Displacement of the

local law is not to be inferred unless clearly indicated by considerations persuasive of the statutory purpose. The State law must yield only if the purpose of the Act of Congress cannot be otherwise accomplished. Certainly it will not be contended that the bringing of an action by respondent in the Eastern District of New York, which is the point farthest removed where suit could be brought, is essential to the accomplishment of the purposes of the act.

The right to bring an action in a distant district under section 6 of the Federal Employers' Liability Act is no more sacred than that established by the Federal Constitution to sue in any State, the same as citizens of that State. If, when the distant action be under the circumstances inequitable, prosecution of the latter can be enjoined, so should the prosecution of the former. That a Federal statute confers the right to sue in a Federal Court does not prevent another court from enjoining the plaintiff in a suit brought pursuant to that statute from further prosecution thereof when such prosecution is inequitable. No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now, nor any attempt to interfere with any action of that court. It was only sought to compel a citizen of Ohio to conduct himself in accordance with the laws of Ohio, and refrain from prosecuting harassing and vexatious litigation, since he had abundant opportunity of litigating his cause of action without such harassment and vexation. That conduct was determinable by the laws of Ohio and the Supreme Court of Ohio erred in setting aside its own judgment in that respect due to a mistaken construction of the Federal Act, and of the decisions of the Federal Courts.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers, in order that the Respondent may be enjoined from his inequitable conduct and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

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